

THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

SENIOR HOUSING ASSISTANCE  
GROUP,

Plaintiff,

v.

AMTAX HOLDINGS 260, LLC, et al.,

Defendants.

AMTAX HOLDINGS 260, LLC, et al.,

Counter-Plaintiffs,

v.

SENIOR HOUSING ASSISTANCE  
GROUP, et al.,

Counter-Defendants.

No. 2:17-cv-01115-RSM

**DEFENDANTS AND COUNTER-  
PLAINTIFFS' OPPOSITION TO  
SENIOR HOUSING ASSISTANCE  
GROUP'S AND SENIOR HOUSING  
ASSISTANCE CORPORATION'S  
MOTION FOR SUMMARY JUDGMENT**

**NOTE ON MOTION CALENDAR:**  
DECEMBER 21, 2018

ORAL ARGUMENT REQUESTED

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	SHAG IS NOT ENTITLED TO A DECLARATORY JUDGMENT .....	3
A.	A Unilaterally Exercisable ROFR Is an Oxymoron .....	3
1.	An Option and a ROFR Are Two Distinct Purchase Rights.....	3
2.	Congress Relied on the Distinction Between Options and ROFR When Enacting the Safe Harbor Provision in Section 42(i)(7).....	4
B.	The Plain Language of the Partnership Agreements Does Not Support SHAG’s Claim that Its ROFR Can Be Exercised Unilaterally .....	6
1.	Under Washington Law, Except as Otherwise Defined, the Term “Right of First Refusal” Retains Its Ordinary Meaning .....	6
2.	Section 7.4L Describes Only What Is Required for SHAG to <i>Have</i> the ROFR, Not What is Necessary to <i>Trigger</i> SHAG’s ROFR.....	10
3.	The Parties Intended for the Partnership Agreements to Comport with Section 42, Which Does Not Permit a Below-Market Option .....	11
4.	SHAG’s Interpretation of the ROFR Would Render Provisions of the Partnership Agreements Superfluous and Lead to Untenable Results .....	12
5.	Section 4.5A(iii) Only Prevents the Limited Partners from Blocking a Sale to SHAG Upon the Exercise of Its Validly Triggered ROFR.....	13
C.	Extrinsic Evidence Provides No Support for SHAG’s Position .....	15
1.	SHAG’s Questionable Evidence of Park’s Unilateral Intent Cannot Modify the Unambiguous Language of the Partnership Agreements .....	16
2.	Financial Projections Are Irrelevant to Interpreting the ROFR.....	17
D.	SHAG’s ROFR Has Value Irrespective of Its Exercise.....	19
E.	There Have Been No Enforceable Offers, and Exercise of the Option Does Not Trigger the ROFR .....	22
F.	The Global Indemnity Agreement Creates Triable Issues of Fact as to the Actual Holder of the ROFR.....	23
III.	CONCLUSION.....	24

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Bennett Veneer Factors Inc. v. Brewer</i> , 73 Wn.2d 849, 441 P.2d 128 (1968).....	3, 7, 10, 13, 21
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990).....	16
<i>Comm’r of Internal Revenue v. Tower</i> , 327 U.S. 280 (1946).....	19
<i>Dalton v. Balum</i> , 13 Wn. App. 160, 534 P.2d 56 (1975).....	7
<i>Frank Lyon Co. v. United States</i> , 435 U.S. 561 (1978).....	5
<i>Hearst Commc’ns, Inc. v. Seattle Times Co.</i> , 154 Wn.2d 493, 115 P.3d 262 (2005).....	16, 19
<i>Historic Boardwalk Hall, LLC v. Comm’r of Internal Revenue</i> , 694 F.3d 425 (3rd Cir. 2012), <i>cert. denied</i> , __ U.S. __, 133 S.Ct. 2374 (2013).....	19
<i>Homeowner’s Rehab Inc. v. Related Corp. V SLP, L.P.</i> , 479 Mass. 741, 99 N.E.3d 744 (2018).....	5, 6, 9, 12
<i>Int’l Marine Underwriters v. ABCD Marine, LLC</i> , 179 Wn.2d 274, 313 P.3d 395 (2013).....	6
<i>Kelly v. Ammex Tax &amp; Duty Free Shops W., Inc.</i> , 162 Wn. App. 825, 256 P.3d 1255 (2011).....	9, 10
<i>Matson v. Emory</i> , 36 Wn. App. 681, 676 P.2d 1029 (1984).....	4, 7
<i>Nw. Television Club, Inc. v. Gross Seattle, Inc.</i> , 96 Wn.2d 973, 634 P.2d 837 (1981).....	3
<i>Reddam v. Comm’r of Internal Revenue</i> , 755 F.3d 1051 (9th Cir. 2014) .....	5
<i>Robroy Land Co. v. Prather</i> , 95 Wn.2d 66, 622 P.2d 367 (1980).....	3, 8, 10, 13

1	<i>Rubin v. Moys,</i>	
2	97 Wn. App. 1020 (1999) .....	8
3	<i>S. Kitsap Family Worship Ctr. v. Weir,</i>	
4	135 Wn. App. 900, 146 P.3d 935 (2006) .....	16
5	<i>State v. Chester,</i>	
6	133 Wn. 2d 15, 940 P.2d 1374 (1997) .....	9
7	<i>William G. Hulbert, Jr. &amp; Clare Mumford Hulbert Revocable Living Trust v. Port</i>	
8	<i>of Everett,</i>	
9	159 Wn. App. 389, 245 P.3d 779 (2011) .....	6, 16
10	<b>Statutes</b>	
11	26 U.S.C. § 42(i)(7)(A) .....	5, 11
12	<b>Rules</b>	
13	Fed. R. Evid. 602 .....	4
14	Fed. R. Evid. 1004 .....	4
15	<b>Other Authorities</b>	
16	136 Cong. Rec. 30528 (1990) .....	5
17	H.R. Rep. No. 101–247 (1989) .....	6
18	Merriam-Webster Dictionary, <a href="http://www.merriam-webster.com/dictionary/right%20of%20first%20refusal">http://www.merriam-webster.com/dictionary/right%20of%20first%20refusal</a>	
19	(last visited December 12, 2018) .....	7
20	Thomas W. Giegerich, <i>The Monetization of Business Tax Credits</i> , 12 FLA. TAX	
21	REV. 709, 793 (2012) .....	5
22	Tracy A. Kaye, <i>Sheltering Social Policy in the Tax Code: The Low-Income</i>	
23	<i>Housing Credit</i> .....	5

1 **I. INTRODUCTION**

2 Plaintiff and Counter-Defendant Senior Housing Assistance Group (“SHAG”) is the  
 3 holder of rights of first refusal (“ROFR”) to purchase seven affordable housing properties (the  
 4 “Projects”) from the limited partnerships (the “Partnerships”) that were formed to develop and  
 5 operate those Projects under the federal Low-Income Housing Tax Credit (“LIHTC”) program  
 6 codified in Section 42 of the Internal Revenue Code (“Section 42”). SHAG seeks a declaration  
 7 from this Court that it may exercise its ROFR unilaterally—even in the absence of a bona fide  
 8 third-party offer to purchase the Projects, and even without the Partnerships’ intent to sell,  
 9 requiring the consent of Defendants and Counter-Plaintiffs (the “Limited Partners”), who  
 10 collectively own more than 99% of each Partnership. SHAG is not entitled to such a declaration.

11 The ROFR granted to nonprofit SHAG pursuant to the limited partnership agreements for  
 12 the Projects (the “Partnership Agreements”) permits SHAG to purchase the Projects at a below-  
 13 market price specified by Section 42 once the ROFR is triggered by the owner’s willingness to  
 14 accept a bona fide third-party offer. The ROFR is thus a *defensive* right that inhibits the  
 15 Partnerships from selling the Projects out from under SHAG, because doing so would trigger  
 16 SHAG’s right to purchase the Projects at below-market prices. SHAG’s contrary interpretation  
 17 of its ROFR as unilaterally exercisable effectively supplants the ROFR with an *option*, in  
 18 contravention of the plain language of the Partnership Agreements, the ordinary meaning of a  
 19 ROFR, and the requirements of Section 42, with which the Partnership Agreements are expressly  
 20 intended to comply. SHAG’s efforts to force the Limited Partners out of the Partnerships against  
 21 their will and at substantially below-market prices must be rejected.

22 *First*, SHAG’s interpretation of the ROFR as unilaterally exercisable is oxymoronic, and  
 23 improperly confuses a ROFR with an option. The two rights, however, are not only distinct, but  
 24 are distinguishable *precisely because* an option, unlike a ROFR may be exercised unilaterally.  
 25 Congress, moreover, relied on this distinction when it enacted the safe harbor provision in  
 26 Section 42(i)(7).

1        *Second*, the plain language of the Partnership Agreements does not support SHAG’s  
 2 claim that its ROFR may be exercised unilaterally. Indeed, the term “Right of First Refusal” is  
 3 ordinarily understood under Washington law as being a *defensive* purchase right that is only  
 4 triggered where there is a bona fide third-party offer that the owner is willing to accept, and in  
 5 the absence of a contrary definition, that understanding controls its meaning in the Partnership  
 6 Agreements. SHAG, however, improperly conflates the conditions that must be satisfied for  
 7 SHAG to *have* its ROFR with what is necessary for SHAG to *exercise* its ROFR, and misreads  
 8 Section 4.5A(iii) of the Partnership Agreement to erroneously suggest that the consent of the  
 9 Limited Partners is unnecessary to trigger SHAG’s right to exercise its ROFR. The Partnership  
 10 Agreements, moreover, are expressly intended to comply with Section 42, and Congress  
 11 considered and affirmatively declined to create a safe harbor in Section 42 for below-market  
 12 options in favor of a safe harbor that extends only to below-market ROFR.

13        *Third*, SHAG seeks to introduce extrinsic evidence that it claims demonstrates the  
 14 parties’ intention to confer to SHAG a unilaterally exercisable right to purchase the Projects at a  
 15 below-market price. SHAG, however, misconstrues the evidence, which cannot in any event be  
 16 used to vary the ordinary meaning of the ROFR.

17        *Fourth*, SHAG argues that unless the ROFR is unilaterally exercisable by SHAG, it has  
 18 no value. SHAG fails, however, to account for circumstances in which the ROFR could be  
 19 triggered, and also ignores that the ROFR is a defensive right that protects SHAG even if it is  
 20 never exercised by inhibiting the Limited Partners from forcing a sale to third-party buyers.

21        *Fifth*, contrary to SHAG’s contention, none of the seven Partnerships has received a bona  
 22 fide, enforceable third-party purchase offer, and SHAG’s ROFR is not triggered by the exercise  
 23 of a fair-market option held by the Partnerships’ General Partners.

24        *Finally*, even if the Court were somehow to find that SHAG could exercise its ROFR in  
 25 the absence of a bona fide third-party offer that the Partnerships (including the Limited Partners)  
 26 are willing to accept, SHAG still is not entitled to summary judgment because the Global

1 Indemnity Agreement it entered into with for-profit entities raises a triable issue of fact as to  
 2 whether SHAG can be considered the true holder of the ROFR.

3 For these reasons, explained in greater detail below, the Court must reject SHAG's claim  
 4 that its ROFR can be exercised unilaterally, and deny SHAG's motion for summary judgment.

## 5 **II. SHAG IS NOT ENTITLED TO A DECLARATORY JUDGMENT<sup>1</sup>**

### 6 **A. A Unilaterally Exercisable ROFR Is an Oxymoron**

7 SHAG's position that the "Right of First Refusal" described in Section 7.4L of the  
 8 Partnership Agreements can be unilaterally exercised converts the ROFR into the functional  
 9 equivalent of an option, in contravention of common law and Congressional intent behind the  
 10 Section 42 safe harbor. *See* Dkt. 90-1, Exs. Y–Z; Dkt. 90-2, Exs. AA–DD; Dkt. 91-1, Ex. EE  
 11 (collectively, the "Partnership Agreements") § 7.4L. Indeed, as explained below, whether a  
 12 purchase right can be exercised unilaterally or only defensively is the decisive factor in  
 13 determining whether that right can properly be described as an option or a ROFR, and Congress  
 14 relied on that distinction when it limited the Section 42 safe harbor to below-market ROFR.

#### 15 **1. An Option and a ROFR Are Two Distinct Purchase Rights**

16 It is well-settled that a ROFR is distinct from an option precisely because of the ability of  
 17 the holder to force an unwilling owner to sell. *See, e.g., Bennett Veneer Factors Inc. v. Brewer*,  
 18 73 Wn.2d 849, 853–54, 441 P.2d 128 (1968) (unlike a "normal option contract[,] a right of first  
 19 refusal is a "preemptive right" that gives "the prospective purchaser the right to buy upon terms  
 20 established by the seller; *but only if the seller decides to sell*") (emphasis added); *Nw. Television*  
 21 *Club, Inc. v. Gross Seattle, Inc.*, 96 Wn.2d 973, 980 n.2, 634 P.2d 837 (1981) ("The right of first  
 22 refusal ripens when the owner forms a specific intention to sell the property."); *Robroy Land Co.*  
 23 *v. Prather*, 95 Wn.2d 66, 71, 622 P.2d 367 (1980) ("The holder of a right of first refusal has far  
 24 less of an interest in land than the holder of an ordinary option. The preemptioner has no power  
 25

26 <sup>1</sup> The Limited Partners incorporate by reference the statement of facts as set forth in its motion for summary judgment, Dkt. 89, and will not recite such facts again here.

1 or right to affect the property in any way *until its owner expresses a desire and willingness to*  
 2 *sell.*”) (emphasis added); *Matson v. Emory*, 36 Wn. App. 681, 684, 676 P.2d 1029 (1984) (“If the  
 3 right holder wants the privilege of . . . forcing a sale, those additional rights should be obtained  
 4 through an option.”). By arguing that it can exercise its ROFR unilaterally, SHAG improperly  
 5 disregards this fundamental distinction between a ROFR and an option.

## 6 **2. Congress Relied on the Distinction Between Options and ROFR When** 7 **Enacting the Safe Harbor Provision in Section 42(i)(7)**

8 SHAG claims that, because the ROFR in Section 7.4L of the Partnership Agreements  
 9 contemplates a price established by Section 42(i)(7) that need not match the terms of a third-  
 10 party offer, distinction between options and ROFR has no bearing on its interpretation. *See* Dkt.  
 11 85 (“SHAG MSJ”) at 16 (“Without the requirement that SHAG match the terms of a third-party  
 12 offer, the right conveyed in Section 7.4L is something other than a common law ‘right of first  
 13 refusal.’”); *see also* Dkt. 93 (“Park Decl.”), ¶ 38 (“Section 7.4L should be viewed as being self-  
 14 contained or self-sufficient, and not dependent on any broad analysis or interpretation about the  
 15 distinction between an option and a right of first refusal.”).<sup>2</sup> SHAG’s argument, however,  
 16 ignores that when Congress passed Section 42(i)(7), it specifically contemplated the existence of  
 17 a ROFR at a price set by Section 42, and understood that even in the absence of a requirement  
 18 that the ROFR-holder match the terms of a third-party offer, such a ROFR continued to be  
 19 distinguishable from an option based on whether or not it could be unilaterally exercised.

20 Section 42(i)(7) permits the transfer of projects to nonprofit organizations for a below-  
 21 market purchase price *only* pursuant a right of first refusal—not an option:  
 22

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23 <sup>2</sup> This paragraph is one of many paragraphs in the First Declaration of Bryan Park that is inadmissible  
 24 under the Federal Rules of Evidence. AMTAX hereby objects to Paragraphs 20–22, 30, 32, 37, 38 of Mr. Park’s  
 25 Declaration on the ground that Mr. Park lacks personal knowledge (*see* Fed. R. Evid. 602); and to Paragraphs 23,  
 26 25, 26, 28, 29, 33, 35, 36, 38, 41, 42, 46, and 47 on the ground that they contain improper legal conclusions and the  
 underlying documents speak for themselves (*see* Fed. R. Evid. 1004). AMTAX also hereby objects to Paragraphs  
 29, 30, 37, 43, 46, and 49 of the Declaration of John “Jay” Woolford on the ground that they contain improper legal  
 conclusions and the underlying documents speak for themselves (*see* Fed. R. Evid. 1004); and to Paragraph 6 of the  
 Declaration of Joel Rubenzahl on the ground that Mr. Rubenzahl lacks personal knowledge (*see* Fed. R. Evid. 602).



No Federal income tax benefit shall fail to be allowable to the taxpayer with respect to any qualified low-income building merely by reason of a **right of 1st refusal** held by the tenants (in cooperative form or otherwise) or resident management corporation of such building or by a qualified nonprofit organization (as defined in subsection (h)(5)(c)) or government agency to purchase the property after the close of the compliance period for a price which is not less than the minimum purchase price determined under subparagraph (B).

26 U.S.C. § 42(i)(7)(A) (emphasis added). When Congress enacted the Section 42(i)(7) safe harbor, it initially considered permitting a unilateral *option* to purchase LIHTC properties at the Section 42 price, but rejected that language in favor of a preemptive *right of first refusal* because it recognized that, under the “economic substance” doctrine, the holder of a unilateral below-market option could be considered the true owner of the property for tax purposes, and thereby endanger the ability of the investor limited partner to claim the tax credits.<sup>3</sup> See Tracy A. Kaye, *Sheltering Social Policy in the Tax Code: The Low-Income Housing Credit*, 38 Villanova L. Rev. 871, 893 (1993) (noting that “there was congressional concern that the grant of a below-market *option* (as proposed by the Low-Income Housing Tax Credit Act of 1989) was a substantial enough relinquishment of one of the benefits of ownership that true ownership was at issue”). Congress therefore enacted a version of Section 42(i)(7) that permitted a below-market *right of first refusal*, which—unlike an option—“does not give the holder the power to compel an unwilling owner to sell.” *Id.* at 897; see also 136 Cong. Rec. 30528 (Oct. 18, 1990 Senate Report) (describing Section 42(i)(7) ROFR as applying “should the owner decide to sell”).

In light of Congress’s limitation of the Section 42(i)(7) safe harbor to ROFRs and not options, it is clear that the parties intended the ROFR in Section 7.4L to be just that—a ROFR—in order to maintain the tax benefits for which the Partnership was created. See *Homeowner’s*

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<sup>3</sup> Under the economic substance doctrine, an investor partner can receive tax credits only if the LIHTC partnership is considered the true owner of the property, which requires it to have a tax-independent potential for profit. See *Reddam v. Comm’r of Internal Revenue*, 755 F.3d 1051, 1059 (9th Cir. 2014); *Frank Lyon Co. v. United States*, 435 U.S. 561, 572–73 (1978) (holding that the economic substance of a transaction, rather than its form, determines who the true owner is for tax purposes); Thomas W. Giegerich, *The Monetization of Business Tax Credits*, 12 FLA. TAX REV. 709, 793 (2012) (an investment must have “sufficient hallmarks of ownership”). Because an option to purchase the property at the below-market Section 42 price would unilaterally transfer this profit potential from the partnership to the option holder, Congress was concerned that, under the economic substance doctrine, the IRS would consider a Section 42 option holder to be the true owner of the property instead of the partnership.

1 *Rehab Inc. v. Related Corp. V SLP, L.P.*, 479 Mass. 741, 99 N.E.3d 744, 760 (2018) (“Where the  
 2 agreement was intended to operate ‘in accordance with’ § 42(i)(7), we must interpret its  
 3 provisions consistently with Congressional intent, and Congress intended for nonprofit  
 4 organizations to exercise their right of first refusal only when ‘the owner decide[s] to sell.’”) (quoting H.R. Rep. No. 101–247, 101st Cong., 1st Sess., at 1195 (1989)). The construction of  
 5 the ROFR advanced by SHAG—that it can be exercised in the absence of the owner’s  
 6 willingness to sell—therefore must be rejected. *See Homeowner’s Rehab*, 479 Mass. at 758  
 7 (rejecting argument that the partnership need not have decided to accept the third-party offer to  
 8 trigger the ROFR “because it effaces the common-law distinction between a right of first refusal  
 9 and an option to purchase, which . . . Congress relied upon when it enacted § 42(i)(7)”).<sup>4</sup>

11 **B. The Plain Language of the Partnership Agreements Does Not Support**  
 12 **SHAG’s Claim that Its ROFR Can Be Exercised Unilaterally**

13 In its effort to establish a unilateral right to purchase the Projects, SHAG ignores the  
 14 import of the term “Right of First Refusal” as used in the Partnership Agreements, and instead  
 15 promotes a facially implausible reading of Section 7.4L that would eviscerate the distinction  
 16 between a ROFR and an option by making the ROFR exercisable even in the absence of a third-  
 17 party offer and a willingness to accept that offer. As explained below, the Court should reject  
 18 SHAG’s argument and enforce the Partnership Agreements according to their terms.

19 **1. Under Washington Law, Except as Otherwise Defined, the Term**  
 20 **“Right of First Refusal” Retains Its Ordinary Meaning**

21 Where, as here, the term “Right of First Refusal” is not affirmatively defined in the  
 22 contract, the term “will be given [its] ‘plain, ordinary, and popular meaning.’” *Int’l Marine*

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24 <sup>4</sup> SHAG argues that “the contract terms control even if there may be a ‘risk of unintended tax implications’  
 25 for the partnership.” *See* SHAG MSJ at 20 (relying on *Homeowner’s Rehab*, 479 Mass. at 762 n.15). But a contract  
 26 should be interpreted in light of its purpose, and the Partnership Agreements themselves expressly state that they are  
 intended to comport with the requirements of Section 42. Partnership Agreements §§ 2.3, 7.4(A), (C), (L); *see also*  
*William G. Hulbert, Jr. & Clare Mumford Hulbert Revocable Living Trust v. Port of Everett*, 159 Wn. App. 389,  
 400, 245 P.3d 779 (2011) (noting the relevance of a contract’s “subject matter and objective”).

1 *Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 284, 313 P.3d 395 (2013) (explaining that  
 2 the plain meaning is determined by reference to dictionaries and common law). In this case, as  
 3 explained by the Washington Supreme Court,

4 [t]he phrase ‘first refusal right’ and terms of similar import have a well understood  
 5 meaning in the business world which is that the owner of such a contract right is entitled  
 6 to the opportunity to buy the subject property on the same terms contained in a *bona fide*  
*offer from a third party acceptable to the owner of the goods.*

7 *Bennett*, 73 Wn.2d at 856 (emphasis added); *see also Matson*, 36 Wn. App. at 683 (“The right [of  
 8 first refusal] has been defined as entitling the owner of the right to the opportunity to buy the  
 9 subject property on the same terms contained in a bona fide offer from a third party, acceptable  
 10 to the property owner.”); Merriam-Webster Dictionary, [http://www.merriam](http://www.merriam-webster.com/dictionary/right%20of%20first%20refusal)  
 11 [webster.com/dictionary/right%20of%20first%20refusal](http://www.merriam-webster.com/dictionary/right%20of%20first%20refusal) (last visited December 12, 2018)  
 12 (defining “right of first refusal” as “the right to have the first choice to buy something on the  
 13 same terms as *offered to someone else*”) (emphasis added).

14 Including a term like “Right of First Refusal” or “ROFR” in a contract thus implies certain  
 15 presumptions that need not be expressly set out in the contract. *See Bennett*, 73 Wn.2d at 856  
 16 (holding that the requirements for exercise of a ROFR are “implied from the use of the term ‘first  
 17 refusal’” “irrespective of whether it is specifically provided for in the agreement”). These  
 18 presumptions—*i.e.*, that the right is exercisable (1) on the same terms as (2) a bona fide third-  
 19 party offer (3) that the owner is willing to accept—can be modified, but otherwise apply. *See*  
 20 *Dalton v. Balum*, 13 Wn. App. 160, 161–62, 534 P.2d 56 (1975) (“The rule in Washington is that  
 21 the owner of a right of first refusal is entitled to the opportunity to buy the subject property on the  
 22 same terms contained in a bona fide offer from a third party acceptable to the owner.”).

23 Here, the only aspect of a traditional ROFR that has been modified in Section 7.4L of the  
 24 Partnership Agreements is the requirement that the ROFR be exercised on the same terms as the  
 25 third-party offer. Instead of matching the price set by the acceptable third-party offer, the  
 26 Partnership Agreements provide that SHAG’s ROFR is exercisable at not less than the statutorily

1 defined purchase price in Section 42(i)(7). *See* Partnership Agreements § 7.4L. The price-  
 2 matching feature, however, is not a necessary element of a ROFR, which “‘merely requires the  
 3 owner, when and if he decides to sell, to offer the property first to the person entitled to the pre-  
 4 emption, *at the stipulated price.*’” *Robroy*, 95 Wn.2d at 70 (internal quotation marks and  
 5 citations omitted) (emphasis added); *see also Rubin v. Moys*, 97 Wn. App. 1020, \*7 (1999)  
 6 (holding that “a right of first refusal to purchase [property] for a *set price* in the event it would be  
 7 sold” was a valid ROFR) (emphasis added). Moreover, even if the matching element were a  
 8 defining characteristic of a ROFR, the Partnership Agreements do not modify any of the other  
 9 defining characteristics. (*See id.* § 7.4L (providing only that SHAG “shall have a ‘Right of First  
 10 Refusal’ (the ‘Special ROFR’) to purchase the Project” at not less than the minimum price under  
 11 Section 42(i)(7)).) Contrary to SHAG’s suggestion, the stipulation to the Section 42 price does  
 12 not convert the right into another type of right altogether (*i.e.*, an option).

13 SHAG points to the fact that the need for a bona fide offer and willingness to accept was  
 14 expressly recognized in the “Right of First Refusal Agreement” for a different project, Ballinger  
 15 Court, to argue that “[i]f the parties had wanted to give SHAG a different purchase right, they  
 16 knew how to do so.” SHAG MSJ at 18. The Ballinger Court agreement, however, serves only to  
 17 confirm that, whether affirmatively stated or not, the parties shared the ordinary understanding of  
 18 a “Right of First Refusal” as a defensive right that is not triggered in the absence of those  
 19 elements. If the parties wanted to modify that ordinary understanding, they knew how to do so,  
 20 as evidenced by the modification of the “matching” element in SHAG’s Section 42 ROFR. That  
 21 the parties simply chose to make explicit in the later-executed Ballinger Court agreement the  
 22 requirements that are otherwise implied by the use of the term “Right of First Refusal” in the  
 23 Partnership Agreements does not negate those implications in the earlier agreements.

24 Nor does the fact that the ROFR in Section 7.4L is labeled a “Special ROFR” and  
 25 contemplates a price set by Section 42 convert that preemptive right into a unilateral option. As  
 26 with the Partnership Agreements, an undefined term used in Section 42 is given its common law

1 or ordinary meaning. *See State v. Chester*, 133 Wn. 2d 15, 22, 940 P.2d 1374 (1997) (“In the  
 2 absence of a specific statutory definition, words in a statute are given their common law or  
 3 ordinary meaning.”). Thus, the ROFR contemplated by Section 42(i)(7) also contains all of the  
 4 same requirements as an ordinary ROFR, except that there is a statutorily set purchase price.<sup>5</sup>

5 SHAG, however, urges the Court to look beyond the term “Right of First Refusal” in  
 6 Section 7.4L, and instead “look to the substance of the right conveyed to determine whether the  
 7 right is a common law right of first refusal or something else entirely,” and to conclude based on  
 8 that review that the Section 42 ROFR in Section 7.4L is essentially a below-market option. *See*  
 9 SHAG MSJ at 15–16 (relying on *Kelly v. Ammex Tax & Duty Free Shops W., Inc.*, 162 Wn. App.  
 10 825, 830–32, 256 P.3d 1255 (2011)). But the court in *Kelly* was asked to determine the nature of  
 11 a right that had been referred to confusingly as both a “right of first refusal” and a “right of first  
 12 offer,” and the court resolved the ambiguity by applying the right as described in the contract.  
 13 *Kelly*, 162 Wn. App. at 830–32. Here, by contrast, SHAG asks the Court to treat its ROFR like  
 14 an option even though (a) the ROFR is never referred to as an option, and (b) the parties did use  
 15 the term “option” elsewhere in the Partnership Agreements to describe different, unilateral rights  
 16 to purchase the Project at *fair market value*, demonstrating that the parties used the term “option”  
 17 when describing a unilateral purchase right. Indeed, far from supporting SHAG’s construction  
 18 of the ROFR, *Kelly* confirms that a ROFR “requires the landowner to first get an offer to  
 19 purchase from a third party, that the seller is willing to accept.” *Id.* at 831.

20  
 21  
 22  
 23 <sup>5</sup> Indeed, the only Court to have interpreted the inclusion of a Section 42 ROFR in a partnership agreement  
 24 confirmed that to be exercisable, there must have been a third-party offer and the partnership must have decided to  
 25 accept the third-party offer. *See Homeowner’s Rehab*, 479 Mass. at 741. SHAG attempts to distinguish  
 26 *Homeowner’s Rehab* on the ground that the contract in that case provided that the project would be “offered” to the  
 ROFR-holder once the ROFR was triggered, whereas the Partnership Agreements allow the ROFR-holder “to  
 purchase” the Project once the ROFR is triggered. *See* SHAG MSJ at 21. SHAG, however, fails to explain what  
 meaningful difference there is between being offered and being allowed to purchase the project. Indeed there is  
 none. *Homeowner’s Rehab*, 479 Mass. at 746 (describing that once the project is “offered” through a “disposition  
 notice,” the ROFR-holder “can exercise its right of first refusal and acquire the property interest”).

1                   **2.       Section 7.4L Describes Only What Is Required for SHAG to *Have* the**  
 2                   **ROFR, Not What is Necessary to *Trigger* SHAG’s ROFR**

3               To distract from the ordinary meaning of the term “Right of First Refusal,” SHAG claims  
 4               that Section 7.4L grants it “the straightforward right simply ‘to purchase the Project’ if it meets  
 5               the conditions expressly listed in Section 7.4L”—*i.e.* that it remains (1) the lessee and operator of  
 6               the project and (2) a “qualified nonprofit organization.” *See* SHAG MSJ at 15, 21.

7               SHAG, however, conflates the conditions for *exercise* of its ROFR with the requirements  
 8               for *possession* of the ROFR. The requirements that SHAG be a qualified nonprofit organization  
 9               and the operator and lessee of the Project are threshold criteria that must be met in order for  
 10              SHAG even to have the ROFR in the first place. *See* Partnership Agreements § 7.4L (providing  
 11              that, subject to its continuing status as a qualified nonprofit organization and the operator and  
 12              lessee of the Projects, SHAG “shall *have* a ‘Right of First Refusal’ (the “Special ROFR”))”  
 13              (emphasis added). Having a ROFR, however, is not the same as being able to exercise it to  
 14              purchase the Projects. *See Robroy*, 95 Wn.2d at 71 (“The [ROFR-holder] has no power or right  
 15              to affect the property in any way until its owner expresses a desire and willingness to sell.”);  
 16              *Kelly*, 162 Wn. App. at 831 (“A right of first refusal does not become an option to purchase until  
 17              the owner of the property voluntarily decides to sell the property and receives a bona fide offer to  
 18              purchase from a third party.”) (citing *Bennett*, 73 Wn.2d at 856).<sup>6</sup>

19              The preconditions that the Partnership Agreements impose for the *possession* of the  
 20              ROFR are consistent with the legislative scheme codified in Section 42. As noted in the Limited  
 21              Partners’ summary judgment motion, Congress only allows a Section 42 ROFR to be granted to  
 22              certain types of entities, including “qualified nonprofit organizations,” without jeopardizing the

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23  
 24              <sup>6</sup> Similarly, Section 7.4K provides that in the event the Investor Limited Partner exercises its Limited  
 25              Partnership Option to force a sale, “the Purchaser *shall have* a Right of First Refusal to purchase the Project in  
 26              accordance with the provisions of Paragraph 7.4L hereof.” *See* Partnership Agreements § 7.4K (emphasis added).  
 This is because, while SHAG *possesses* the ROFR in that circumstance, only one of the two requirements for the  
*exercise* of a ROFR is present—the Investor Limited Partner’s willingness to sell. Once there is a bona fide third-  
 party offer, the ROFR will become exercisable. *See Kelly*, 162 Wn. App. at 831 (holding that a ROFR “requires the  
 landowner to first get an offer to purchase from a third party, that the seller is willing to accept”).



Partnership's entitlement to tax credits. *See* 26 U.S.C. § 42(i)(7)(A) ("No Federal income tax benefit shall fail to be allowable to the taxpayer with respect to any qualified low-income building merely by reason of a right of 1st refusal held by . . . a qualified nonprofit organization (as defined in subsection (h)(5)(C))"). Section 7.4L of the Partnership Agreements accordingly contains language confirming that, in order to "have" the Section 42 ROFR, the Purchaser must be a qualified nonprofit organization.

### 3. The Parties Intended for the Partnership Agreements to Comport with Section 42, Which Does Not Permit a Below-Market Option

The parties deliberately chose to grant SHAG a Section 42 ROFR instead of a below-market option because granting a below-market option would have jeopardized the Partnership's ability to take advantage of Section 42's tax benefits, in contravention of the Partnership's express purpose. (Declaration of Craig H. Bessenger ("Bessenger Decl."), Ex. QQQ (Transcript of Second Deposition of Bryan Park ("Park Dep. Tr. II")) at 38:20–40:02 (acknowledging that granting a below-market option "could create some concerns for . . . investor's tax counsel" because it would undermine whether the deal was in "compliance with Section 42(i)[,]" and specifically "whether the deal was within the safe harbor of Section 42(i)(7)").)

That the parties intended for the Partnership Agreements to comport with Section 42 is evident throughout the Partnership Agreements, including as follows:

- **Section 2.3** provides that the purpose of agreement is to enter into Operating Use Leases with SHAG "to operate the Project on behalf of the Partnership in such a manner as to cause the Project to constitute a qualified low income housing project . . . within the meaning of Section 42(g) of the Code."
- **Section 7.4C** provides that the General Partners "shall cause the Lessee . . . to hold for occupancy such percentage of the apartment units in the Project in such a manner as to qualify the entire Project as a 'qualified low income housing project' under Section 42(g) of the Code" . . . [and] shall cause the Lessee not to take any action . . . which

would cause the recapture of any Federal Housing Tax Credit without the Consent of the Investor Limited Partner.”

- **Section 7.4L** incorporates the definition of “qualified nonprofit organization” that is specified by Section 42(h)(5)(C) as well as the minimum statutory purchase price set forth in Section 42(i)(7)(B)).<sup>7</sup>

These repeated references to Section 42 confirm that the parties did not intend to grant any purchase rights to SHAG that would jeopardize the Partnerships’ tax status and/or eligibility for tax benefits under Section 42, and thus intended for SHAG’s purchase right in Section 7.4L to fall within the safe harbor that Congress limited to below-market *rights of first refusal*.

#### **4. SHAG’s Interpretation of the ROFR Would Render Provisions of the Partnership Agreements Superfluous and Lead to Untenable Results**

By including both an option and a ROFR in the Partnership Agreements, the parties clearly recognized that the ROFR and option are distinct rights. To nonetheless interpret the ROFR as unilaterally exercisable, as SHAG urges, would violate key precepts of contract interpretation. Because the option is exercisable at the *greater of* fair market value and the Section 42 price, *see* Partnership Agreements § 7.4J, in circumstances where the fair market value is *lower* than the Section 42 price, the ROFR-holder and the option-holder would *both* have an absolute unilateral right to purchase at the Section 42 price. Because in all but one of the Partnership Agreements the ROFR-holder and the option-holder are different entities, the result would be that two distinct entities would have the same one right to purchase the Projects. *See Hartford Fire Ins. Co. v. Columbia State Bank*, 183 Wn. App. 599, 608, 334 P.3d 87 (2014) (“[Courts] avoid interpreting statutes and contracts in ways that lead to absurd results.”).

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<sup>7</sup> Relying on *Homeowner’s Rehab*, SHAG argues that the negative tax implications of its interpretation of the ROFR are irrelevant, *see* SHAG MSJ at 21–22, but this argument ignores these provisions in the Partnership Agreements, which confirm that the parties intended to draft the ROFR in a way that would not jeopardize the Partnerships’ low-income housing tax credits. Moreover, that the ROFR cannot be exercised until after the compliance period, *id.* at 22, is of no moment because (a) it is the *grant* of the ROFR, not its exercise, that raises concerns under tax principles and that the Section 42 safe harbor protects; and (b) by definition, for it to comply with Section 42(i)(7), a below-market ROFR cannot be exercised until “after the close of the compliance period.”



Moreover, in the one Partnership Agreement in which SHAG holds both the ROFR and the option (the Auburn Court Partnership Agreement), the option would be rendered superfluous because, where fair market value is *greater* than the Section 42 price, there would be no reason for SHAG to exercise the higher-priced option instead of its ROFR; and where fair market value is *less* than the Section 42 price, the option affords nothing beyond what is already provided by the ROFR. *See Diamond B Constructors, Inc. v. Granite Falls Sch. Dist.*, 117 Wn. App. 157, 165, 70 P.3d 966 (2003) (“We must construe a contract to give meaning to every term.”).

SHAG seeks to avoid the absurd consequences of its interpretation by arguing that the option is subordinate to the ROFR, but options, by definition, cannot be subordinate to another party’s purchase right. *See Bennett*, 73 Wn.2d at 853 (option “is a complete, valid and binding agreement by the terms of which a collateral offer is kept open for a specified period of time”); *Robroy*, 95 Wn.2d at 71 (“The holder of a right of first refusal has far less of an interest in land than the holder of an ordinary option.”). Indeed, the parties recognized as much when they expressly provided that the Section 7.4K forced sale right was subject to the ROFR in Section 7.4L, but included no such language to subordinate the Section 7.4J option to the ROFR.

##### **5. Section 4.5A(iii) Only Prevents the Limited Partners from Blocking a Sale to SHAG Upon the Exercise of Its Validly Triggered ROFR**

In an attempt to benefit from the limited holding in *Homeowner’s Rehab*, SHAG argues that the Investor Limited Partner’s assent is not required in order for the Partnership to consent to a third-party sale so as to trigger SHAG’s ROFR. *See* SHAG MSJ at 20–21. The *Homeowner’s Rehab* court, however, “emphasize[d] that [it was] only interpreting the language of the agreements that the parties executed [t]here,” and that case thus provides no support for SHAG’s argument in the context of its distinct contracts with the Limited Partners. *Homeowner’s Rehab*, 479 Mass. at 761. Far from obviating the need for Investor Limited Partner consent to trigger the ROFR, the relevant sections of the Partnership Agreements here confirm that the Limited Partners’ consent is *necessary*.

Specifically, Section 4.5A(iii) of the Partnership Agreements provides that the Investor Limited Partner has the general right to approve or disapprove of a sale of the Partnership's assets, subject to limited exceptions:

[T]he Investor Limited Partners shall have the right . . . with consent of all remaining Partners, to approve or disapprove the sale of all or substantially all of the assets of the Partnership (other than a sale pursuant to the Option described in Section 7.4J or the Special ROFR described in Section 7.4L)[.]

Partnership Agreements § 4.5A(iii).

SHAG claims that the exception set forth in the parenthetical—"other than a sale pursuant to . . . the Special ROFR"—demonstrates that the Limited Partners' willingness to sell the Projects is not a necessary precondition to the valid exercise of SHAG's ROFR. *See* SHAG MSJ at 9. SHAG further claims that the absence of this language in the first two Partnership Agreements—Woodlands and Lakewood Meadows—establishes that "[t]he parties added that exclusion to ensure that there would be no confusion about SHAG's ability to exercise the special ROFR unilaterally." *Id.* at 18–19.<sup>8</sup> This flawed argument, however, conflates the requirement that the Limited Partners approve of a sale to a *third-party* (so as to trigger the valid exercise of the ROFR) with a requirement that the Limited Partners approve of a sale to *SHAG* (once the ROFR has been triggered). The reality is that the parenthetical was necessary to eliminate any argument that the Limited Partners could block the sale of the Projects to SHAG after its ROFR had been validly triggered and exercised, which the parties clearly did not intend. The insertion of the parenthetical thus simply serves to eliminate any confusion and make Section 4.5 fully compatible with SHAG's preemptive ROFR under Section 7.4L.<sup>9</sup>

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<sup>8</sup> Of course, if the addition of the reference to the "Special ROFR described in Section 7.4L" to the parenthetical in Section 4.5A(iii) were necessary to eliminate the Investor Limited Partner's right to withhold approval of the third-party offer that *triggers* the ROFR, as SHAG argues, then the absence of that language in the Partnership Agreements for Woodlands and Lakewood Meadows would suggest that the Limited Partners' *retain* their consent rights in connection with those Projects. While this clearly is not SHAG's position, it is the logical extension of the reasoning it asks the Court to adopt.

<sup>9</sup> Notably, SHAG is unable to muster any evidence in support of its claims concerning the reasons for the changes to Section 4.5A(iii) other than Mr. Park's unsubstantiated and self-serving statements regarding his own

By contrast, to read the parenthetical as SHAG urges would be to create an inconsistency with Section 7.1B of the Partnership Agreements, which restricts the authority of the General Partner to act without the consent of the Investor Limited Partner. *See* Partnership Agreements § 7.1(B). Section 7.1B(viii) expressly states that the General Partner shall not have any authority “to sell or convey the Property, except as provided in Article IIIC,” which in turn provides that the Partnership “must receive the Consent of the Investor Limited Partner” to the terms of any proposed sale. *Id.* §§ 3(C), 7.1(B). Properly read, Section 4.5A(iii) and Section 7.1(B) confirm that there are only two potential sales that the Limited Partners do not have an absolute right to block: (1) a sale to the General Partner pursuant to the exercise of its option; and (2) a sale to SHAG pursuant to the valid exercise of its ROFR, once this right has been triggered by the Partnership’s willingness—with the Limited Partners’ consent—to accept a bona fide third-party offer. If the parties had instead intended to allow the General Partner to consent unilaterally to a third-party sale in order to trigger SHAG’s ROFR against the Limited Partners’ objection, they could have and would have included language in Section 7.1B(viii) that limited the categorical prohibition on the General Partner’s unilateral sale of the Project.<sup>10</sup>

### C. Extrinsic Evidence Provides No Support for SHAG’s Position

Notwithstanding the unambiguous language of the Partnership Agreements, SHAG asks

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intent in including the provisions and his claim that the Limited Partners “did not object to my proposed edits to Section 4.5A(iii), and never questioned why those edits were being proposed.” As noted above, however, these edits were necessary to ensure that SHAG could exercise its ROFR without interference from the Limited Partners if and when it was ever validly triggered, and the Limited Partners had no legitimate reason to object to such a change.

<sup>10</sup> SHAG pulls phrases out of context from the deposition of the Limited Partners’ Rule 30(b)(6) designee Ryan Trane to argue that the Limited Partners do not know why Section 7.4L was included in the Partnership Agreements, or why Section 4.5(A)(iii) includes an exception for the ROFR. *See* SHAG MSJ at 11. Mr. Trane, however, testified to the reasons for both provisions. When asked about Section 7.4L, Mr. Trane testified that “the entire purpose of the special [ ] ROFR is to protect the qualified nonprofit and essentially keep them [ ] in [the Project].” (Bessenger Decl., Ex. RRR (Transcript of Deposition of Ryan Trane) at 189:14–17; *see also id.* at 190:18–21, 191:03–05 (testifying that the Section 7.4L ROFR “is defensive in that it prevents should [the nonprofit] wish to stay on the property, them being . . . kicked out or . . . the property sold [ ] out from under them,” which Mr. Trane testified was important “insomuch as it allows [the nonprofit] to stay a part of the project”). When asked why there was a carve-out in Section 4.5(A)(iii) for the SHAG’s ROFR, Mr. Trane explained that the carve-out applies after the ROFR is “validly exercised.” (*Id.* at 195:10–13.)

1 this Court to consider extrinsic evidence of what it claims was the intent of the parties in  
 2 negotiating the Partnership Agreements. *See* SHAG MSJ at 19. As explained below, the Court  
 3 should disregard this extrinsic evidence.

4 **1. SHAG’s Questionable Evidence of Park’s Unilateral Intent Cannot**  
 5 **Modify the Unambiguous Language of the Partnership Agreements**

6 As an initial matter, SHAG’s proffered evidence should be disregarded because extrinsic  
 7 evidence may not be used “to ‘show an intention independent of the instrument’ or to ‘vary,  
 8 contradict or modify the written word.’” *Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154  
 9 Wn.2d 493, 503, 115 P.3d 262 (2005) (quoting *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222  
 10 (1990)). Here, notwithstanding the Partnership Agreements’ express use of the term “Right of  
 11 First Refusal,” SHAG relies on extrinsic evidence to argue that the “Right of First Refusal”  
 12 should be rewritten to become a purchase right that can be unilaterally exercised by the holder—  
 13 a different right altogether. *See S. Kitsap Family Worship Ctr. v. Weir*, 135 Wn. App. 900, 909,  
 14 146 P.3d 935 (2006) (explaining that the Supreme Court of Washington “distinguished a right of  
 15 first refusal from an ordinary option, which gives the holder the power to compel an unwilling  
 16 owner to sell”). As it would be used to contradict the express terms of the Partnership  
 17 Agreements, the extrinsic evidence should not be considered.

18 Moreover, the primary evidence on which SHAG relies is Bryan Park’s *own* letter to  
 19 Paramount (AMTAX’s predecessor) on behalf of Pacific Northern Construction Company  
 20 (“PNCC”), noting that the general partner is required to obtain a ROFR for SHAG, and reflecting  
 21 *Mr. Park’s* desire for SHAG to have “meaningful opportunities and incentives” in connection  
 22 with one of the seven projects at issue. SHAG MSJ at 9–10, 19 (citing Park Decl., Ex. A).  
 23 SHAG, however, offers no evidence of Paramount’s response to the letter. This self-serving  
 24 evidence of Park’s unilateral intent is not admissible to aid in interpretation of the contract. *See*  
 25 *William G. Hulbert*, 159 Wn. App. at 400 (“[E]xtrinsic evidence of a party’s subjective,  
 26 unilateral intent as to the contract’s meaning is not admissible.”). And even if the letter could be

1 considered evidence of the parties' *mutual* intent, which it cannot, nothing in the letter defines  
 2 the parameters of the ROFR, other than to make clear that it is intended to fall within the safe  
 3 harbor of Section 42(i)(7). *See* Park Decl., Ex. A.

4 Nor can Mr. Park's unfounded statement regarding *Paramount's* intent be considered  
 5 competent evidence of the parties' mutual intent. Mr. Park makes a single conclusory and  
 6 entirely self-serving statement that then Paramount Executive Vice President Michael Buckley  
 7 "agreed" that SHAG's ROFR "would be exercisable by SHAG (if all express conditions were  
 8 met) without requiring the consent of any other party." Park Decl., ¶ 21. Mr. Park, however,  
 9 provides no specific details about this alleged conversation—not a date, location, or description  
 10 of the parties present. Nor does SHAG proffer any evidence regarding Mr. Buckley's role in the  
 11 negotiations, much less any evidence demonstrating that Mr. Buckley was authorized to bind  
 12 Paramount with respect to Mr. Park's characterization of SHAG's ROFR. Moreover, even if this  
 13 highly questionable allegation were true—and SHAG has proffered insufficient evidence that it  
 14 is—it does not demonstrate that the parties mutually intended that the ROFR could be exercised  
 15 without a bona fide third-party offer, which is an additional requirement for exercise of the  
 16 ROFR. At most, Mr. Park's statement regarding Mr. Buckley's intent creates a triable issue of  
 17 fact as to the parties' mutual intent. It certainly does not warrant a grant of summary judgment.

## 18 **2. Financial Projections Are Irrelevant to Interpreting the ROFR**

19 SHAG also relies on evidence of Paramount's financial "projections" to argue that  
 20 interpreting the ROFR as being unilaterally exercisable "makes sense" because the Limited  
 21 Partners "were investing in the projects based on their anticipated tax benefits, not an expectation  
 22 of back-end sale profits." SHAG MSJ at 19. SHAG claims that because the Limited Partners'  
 23 investments have "already exceeded expectations based on their rates of return[.]" (*id.* at 12),  
 24 SHAG should be permitted to unilaterally exercise its ROFR and prevent the Limited Partners  
 25 from participating in any portion of the enormous residual value of the Projects. SHAG's  
 26 position lacks merit.

1 First, in support of its claims regarding the Limited Partners' expectations, SHAG relies  
 2 on a declaration from its purported expert, Joel Rubenzahl, that "Paramount's own internal  
 3 financial projections . . . assumed AMTAX would not receive sale proceeds in assessing the  
 4 expected rate of return on its investments." SHAG MSJ at 12 (citing Declaration of Joel  
 5 Rubenzahl, ¶ 3). Mr. Rubenzahl, however, misunderstands the nature of these types of  
 6 projections, which are often used for "conservative underwriting" purposes as a "worst-case  
 7 scenario" (Declaration of Jon E. Krabbenschmidt ("Krabbenschmidt Decl."), ¶ 5; Bessenger  
 8 Decl., Ex. SSS, (Transcript of Deposition of Jon E. Krabbenschmidt) at 167:08–18), and do not  
 9 reflect the investors' actual expectations.<sup>11</sup> Indeed, it is standard industry practice for LIHTC  
 10 investors to assume that there will be little to no cash distributions for conservative underwriting  
 11 purposes. (Krabbenschmidt Decl., ¶ 4; Bessenger Decl., Ex. TTT (Expert Rebuttal Report of Jon  
 12 E. Krabbenschmidt) at 2.) That does not change the fact that LIHTC investors negotiate for the  
 13 right to receive cash distributions as calculated in accordance with the applicable partnership or  
 14 operating agreements, including distributions from capital transactions. (Krabbenschmidt Decl,  
 15 ¶ 6.) Thus, it would be wrong to conclude that an investor had no expectation of benefits beyond  
 16 the tax benefits generated by a LIHTC investment simply because the investor did not factor  
 17 cash distributions into its financial projections. (*Id.*, ¶ 5.)

18 Moreover, even if the projections reflected the investors' actual view of the likely  
 19 performance of the investment, rather than a conservative one, whether a party expects that the  
 20 ultimate disposition of a project will generate proceeds and whether a party expects to share in  
 21 those proceeds if they are generated are two different questions. Here, the Partnership  
 22 Agreements themselves confirm that the Limited Partners anticipated and are contractually  
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24 <sup>11</sup> In his deposition, Mr. Rubenzahl admitted that he has never spoken with the Investor Limited Partners  
 25 regarding their actual expectations for their LIHTC investments, and has never been involved in *any* negotiations  
 26 regarding *any* such investments. (Bessenger Decl., Ex. UUU, (Transcript of Deposition of Joel Rubenzahl) at  
 93:10–94:13.) Mr. Rubenzahl also confirmed his lack of objectivity on the issues presented in this action, testifying  
 that he has devoted his entire career to efforts to transfer wealth away from LIHTC investors for the benefit of the  
 nonprofit entities for whom he consults. (*Id.* at 18:03–20:03, 32:01–23.)



entitled to a portion of any upside realized from a sale of the Projects. *See* Partnership Agreement § 6.2B(ii) (“waterfall” providing for distribution of cash proceeds from the sale of a Project to the Investor Limited Partner). Indeed, had the Investor Limited Partner *not* had an expectation to share in any profit from the sale of the Project, then the Partnership would have violated the “economic substance” requirements applicable under federal income tax principles. Under the economic substance rule, a partnership will not be recognized as such for federal tax purposes unless all partners are subject to tax-independent upside and downside potential. *See Comm’r of Internal Revenue v. Tower*, 327 U.S. 280, 287 (1946) (all partners must have “really and truly intended to join together for the purpose of carrying on business *and sharing in the profits or losses or both*”) (emphasis added); *Historic Boardwalk Hall, LLC v. Comm’r of Internal Revenue*, 694 F.3d 425, 459 (3rd Cir. 2012) (“dearth of any meaningful upside potential” meant that purported partner in limited liability company was not a bona fide partner for federal tax purposes), *cert. denied*, \_\_\_ U.S. \_\_\_, 133 S.Ct. 2374 (2013).

Because the parties clearly intended for the Partnership to be a real partnership for tax law purposes, *see* Partnership Agreements § 2.3, and expressly contracted for the Investor Limited Partners to share in upside potential of the project, *see id.* § 6.2, SHAG’s attempt to prove through extrinsic evidence that the Limited Partners are not entitled to share in the residual value of the Projects must be rejected. *See Hearst Commc’ns*, 154 Wn.2d at 503 (extrinsic evidence cannot be used to vary the terms of a contract).

#### **D. SHAG’s ROFR Has Value Irrespective of Its Exercise**

SHAG also urges the Court to reject the plain meaning of the Section 42 ROFR in Section 7.4L of the Partnership Agreements because it claims the ROFR “would have no practical value to SHAG” if its exercise required bona fide third-party offers that the Partnerships were willing to accept, requiring the Limited Partners’ consent. *See* SHAG MSJ at 17. This argument fails for several reasons.

1 As an initial matter, the position SHAG has adopted in this litigation—that anything other  
 2 than a unilaterally exercisable ROFR has no value to the ROFR-holder—is belied by the parties’  
 3 own deal history. In his deposition in this action, Mr. Park testified emphatically that he had  
 4 *never* seen a ROFR provision that requires the consent of the Partnership (or limited partners) to  
 5 sell. (*See* Park Dep. Tr. II at 78:09–18 (“When I say no, I mean no.”); *see also id.* 78:19–79:05  
 6 (“Q: . . . [T]hese [ROFR’s requiring the consent of the project partnership to sell] just don’t exist.  
 7 Is that what you’re saying? A: In the tax credit world, absolutely not. I’ve never seen a consent  
 8 provision, and it would be completely contrary to the grant. I mean, what’s the point? Why  
 9 bother? . . . Why bother doing a special ROFR if the limited partner can, you know, change their  
 10 mind 15-plus years later, you know, because they’ve got seller’s remorse.”).)<sup>12</sup> After being  
 11 shown a document by the Limited Partners’ counsel, however, Mr. Park admitted that the ROFR  
 12 agreement he negotiated between SHAG and an AMTAX entity in the Ballinger Court Limited  
 13 Partnership (another partnership between the parties) requires just that—“both a bona fide offer  
 14 and an intention by the partnership to accept that offer.” (Park Dep. Tr. II at 82:05–10; 83:07–  
 15 12); *see also* Dkt. 88-1 (“Woolford Decl.”), Ex. N (“In the event that the Partnership receives a  
 16 bona fide offer to purchase the Apartment Complex . . . , which offer the Partnership intends to  
 17 accept, SHAG shall have a right of refusal to purchase the Apartment Complex. . .”). That Mr.  
 18 Park negotiated in 2004 precisely the type of ROFR for SHAG that he now claims could not  
 19 exist because it would be valueless to the ROFR-holder fatally undermines SHAG’s argument.

20 SHAG’s argument is also based on the erroneous premise that there are *no* circumstances  
 21 in which the Limited Partners would consent to a third-party sale or exercise its forced sale right,  
 22 thereby triggering SHAG’s right to exercise its ROFR. Contrary to SHAG’s assumption, it is not  
 23 difficult to foresee reasons why the Limited Partners would agree to facilitate the transfer of a

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24  
 25 <sup>12</sup> Notably, in explaining that the reason *partnership* consent is never required for exercise of the ROFR is  
 26 that the *limited partners* could change their mind at the end of the compliance period, Mr. Park conceded that the  
 limited partners’ consent is required in order for the partnership to consent to a sale. Park Dep. Tr. II at 78:19–  
 79:05; *see also id.* at 81:03–10 (explaining that having a ROFR with consent rights was inconsistent with his  
 experience because “what’s the point of granting a ROFR when it can be unilaterally denied?”).



1 Project with little residual value to SHAG at the Section 42 Price (*e.g.*, to foster their relationship  
 2 with their nonprofit partner, or because it is administratively simpler to no longer be involved in  
 3 a partnership with limited back-end upside). *See* Dkt. 98 (Declaration of Ryan Trane (“Trane  
 4 Decl.”)) ¶ 9. That such circumstances are not present here—where the Projects have accrued  
 5 enormous equity based on the substantial appreciation in real estate value they have enjoyed—  
 6 does not mean that, at the time it was granted, the ROFR did not provide SHAG with a  
 7 “meaningful opportunity to purchase the Project commensurate with the opportunities enjoyed  
 8 by the other project participants.” SHAG MSJ at 10 (quotation marks and citations omitted).

9 Moreover, the ROFR plays an important role regardless of whether or not it is ever  
 10 exercised. Where a Project has a low residual value at the end of its fifteen-year compliance  
 11 period, it is not uncommon for the price set by Section 42 to be close to, or even higher than, fair  
 12 market value. Trane Decl. ¶ 11. In these circumstances, it can be in the interest of the Limited  
 13 Partners to *trigger* the Section 42 ROFR—either by exercising their forced sale rights under  
 14 Section 7.4.K, or by consenting to a sale to a third party—and *also* be in SHAG’s interest to  
 15 *exercise* the ROFR, because a transfer pursuant to the Section 42 ROFR allows both parties  
 16 avoid the time and resources associated with a sale of the property, and allows SHAG to obtain  
 17 sole ownership and control of the Property. *Id.* Alternatively, where the Project has  
 18 accumulated significant residual value over the compliance period, the ROFR prevents the  
 19 Partnership from cashing in on that value by selling the property out from under the nonprofit,  
 20 because doing so would trigger SHAG’s below-market ROFR. In other words, because the  
 21 ROFR is a preemptive or defensive right, *see Bennett*, 73 Wn.2d at 856, its presence in the  
 22 Partnership Agreements provides value to SHAG even in the absence of its exercise.

23 Finally, it is significant that the Limited Partners’ forced sale right—contained in  
 24 Sections 7.4K of the Partnership Agreements—has the same two-year sunset provision as  
 25 SHAG’s ROFR, such that the Limited Partners cannot simply wait SHAG out and force a sale  
 26 after SHAG’s ROFR has expired. The intended and actual result of this structure is that the only

1 way that the Limited Partners can force an exit from the Partnership is at the Section 42 price,  
2 and the Section 42 ROFR is a critical component of that structure.

3 **E. There Have Been No Enforceable Offers, and Exercise of the Option Does**  
4 **Not Trigger the ROFR**

5 SHAG devotes a single sentence towards the end of its summary judgment brief to  
6 arguing that the Partnerships have received third-party offers to purchase the Projects that were  
7 transmitted to the Limited Partners before or at the time SHAG purported to exercise its ROFR.  
8 *See* SHAG MSJ at 22. Given that SHAG seeks a judicial declaration that it can unilaterally  
9 exercise its ROFR even in the absence of third-party offers, this issue is irrelevant to whether  
10 SHAG is entitled to summary judgment on its affirmative declaratory relief claim (except insofar  
11 as it demonstrates that—despite their claims to the contrary here—SHAG and Mr. Park  
12 recognized that a third-party offer was necessary to trigger SHAG’s ROFR). Moreover, as  
13 explained in the Limited Partners’ summary judgment motion: (a) SHAG has not purported to  
14 exercise its ROFR with respect to three of the seven Projects (*i.e.*, the Lakewood Meadows  
15 Project, the Alderwood Court Project, and the Woodlands Project), *see* Dkt. 89 at 8 n.3; and  
16 (b) the “offers” for the other four Projects were neither bona fide nor enforceable, and thus did  
17 not trigger the Limited Partners’ consent rights or SHAG’s ROFR, *see id.* at 8–11, 21–22.

18 SHAG also claims that the decision by Counter-Defendant Steel Lake Enterprises, LLC  
19 (“Steel Lake”) to exercise its option under Section 7.4J of the Meridian Court Partnership  
20 Agreement independently triggered SHAG’s ROFR to purchase the Meridian Court Project  
21 because, according to SHAG, its “ROFR has priority over the option.” SHAG MSJ at 23. Steel  
22 Lake’s exercise of its option, however, does not trigger SHAG’s ROFR under Section 7.4L.  
23 Indeed, in contrast to Section 7.4K, which provides that “[i]n the event that the Investor Limited  
24 Partner exercises [its Forced Sale Right], [SHAG] shall have a Right of First Refusal to purchase  
25 the Project in accordance with the provisions of Paragraph 7.4L hereof,” Section 7.4J contains no  
26 such language. This demonstrates that the parties knew what to say when they wanted the

1 exercise of a right to trigger the ROFR, but chose not to include that language when discussing  
 2 the General Partner's option.<sup>13</sup>

3 **F. The Global Indemnity Agreement Creates Triable Issues of Fact as to the**  
 4 **Actual Holder of the ROFR**

5 As described in the Limited Partners' summary judgment motion, SHAG entered into a  
 6 Global Indemnity Agreement (the "Global Indemnity Agreement" or "GIA") with Mr. Park and  
 7 his company PNCC whereby SHAG improperly transferred economic ownership interests arising  
 8 from the exercise of its ROFR to for-profit entities controlled by Mr. Park. *See* Dkt. 89 at 6–7.  
 9 Under the GIA, after the exercise of SHAG's ROFR, the Projects would not be owned by SHAG  
 10 outright, but instead would be owned jointly by SHAG and a for-profit entity controlled by Mr.  
 11 Park, with the latter maintaining control over the Project as General Partner and receiving—by  
 12 Mr. Park's estimation—around *ninety percent* of the economic benefits. Dkt. 90-1, Ex. B  
 13 (Transcript of First Deposition of Bryan Park) at 200:10–21; *id.*, Ex. J. If permitted, SHAG's  
 14 exercise of its ROFR under these circumstances would defeat Congress' purpose in enacting the  
 15 Section 42(i)(7) safe harbor—*i.e.*, to promote LIHTC property ownership by qualified nonprofits  
 16 and other eligible groups, including tenants and residential management corporations. *See* Dkt.  
 17 89 at 22–23.

18 In its motion, SHAG attempts to minimize the significance of the Global Indemnity  
 19 Agreement by claiming that, "[b]ecause PNCC's economic interests are the same both before  
 20 and after a Special ROFR exercise, PNCC is economically *indifferent* to whether SHAG  
 21 successfully exercises its Special ROFR." SHAG MSJ at 23 (emphasis in original). SHAG  
 22 ignores, however, that it made this same argument to the state agency responsible for regulating  
 23 affordable housing in Washington State, which *expressly rejected* SHAG's claim. Specifically,  
 24 in a determination letter regarding SHAG's relationship with PNCC that the Washington State

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25 <sup>13</sup> Given that Steel Lake stands to personally gain from SHAG's exercise of its ROFR as a result of the  
 26 Global Indemnity Agreement (*see* Section II.F *infra*), it would be particularly inequitable if Steel Lake could control  
 the triggering of the ROFR through its unilateral right to exercise its option.

1 Housing Finance Commission (the “WSHFC”) issued at SHAG’s request, the WSHFC found  
 2 that “PNCC’s preserved economic interests [under the Global Indemnity Agreement] appear to  
 3 be worth tens of millions of dollars.” Woolford Decl., Ex. D at 12. The WSHFC went on to  
 4 reject SHAG’s claim that “it gave up nothing of value with the GIA,” holding that SHAG’s  
 5 position ignored a number of contrary facts, including “that preserving PNCC’s interests  
 6 precluded SHAG from keeping those interests after exercising those ROFRs in the future . . . .”  
 7 *Id.* at 13. These findings undercut SHAG’s efforts to downplay the substantial transfer of  
 8 economic benefits from the exercise of the ROFR that the GIA accomplished, and raise triable  
 9 issues of fact as to whether, in light of the GIA, SHAG can still be considered the holder of the  
 10 Section 42 ROFR in Section 7.4L of the Partnership Agreements.

11 Ironically, despite ignoring its findings as described above, SHAG seeks to rely on the  
 12 WSHFC determination letter to argue that the existence of the GIA does not impact its ability to  
 13 exercise the ROFR. *See* SHAG MSJ at 24 (“The Commission concluded the Global Indemnity  
 14 Agreement is consistent with SHAG’s mission and does not affect SHAG’s status as a qualified  
 15 nonprofit under the LIHTC statute”). SHAG, however, overstates the scope of WSHFC’s  
 16 evaluation and determination, which were focused solely on whether PNCC “controlled” or was  
 17 “affiliated with” SHAG as those terms are used in Section 42(h)(5)(c)(ii). Other than reaffirming  
 18 SHAG’s nonprofit status under Washington law, the WSHFC did *not* evaluate or make *any*  
 19 findings as to whether SHAG could exercise its ROFR notwithstanding the existence of the GIA.  
 20 The determination letter accordingly is irrelevant to the issues that this Court must address, and  
 21 its existence does not resolve the factual dispute over the impact of the GIA on SHAG’s ROFR.

### 22 **III. CONCLUSION**

23 For the reasons explained above, the Limited Partners respectfully request that the Court  
 24 deny SHAG’s Motion for Summary Judgment.

25  
 26 RESPECTFULLY SUBMITTED this 14th day of December, 2018.

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**CERTIFICATE OF SERVICE**

On December 14, 2018, I caused a copy of DEFENDANTS AND COUNTER-  
PLAINTIFFS' OPPOSITION TO SENIOR HOUSING ASSISTANCE GROUP'S AND  
SENIOR HOUSING ASSISTANCE CORPORATION'S MOTION FOR SUMMARY  
JUDGMENT to be electronically filed via the Court's Electronic Case Filing System, which  
will notify all attorneys of record of the filing.

By: /s/ Sonia Mejia  
Sonia Mejia